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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1139

STATE OF NORTH CAROLINA,
E. W. JONES, COMMANDER, NORTH CAROLINA
STATE HIGHWAY PATROL,
JAKE ALEXANDER, SECRETARY, NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, State of North Carolina, E. W. Jones, formerly Commander, North Carolina State Highway Patrol, Jake Alexander, formerly Secretary, North Carolina Department of Transportation and Highway Safety, pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit filed September 12, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed September 12, 1978, is reported and is printed in the appendix to this Petition. (Appendix A). Petitioners' petition for rehearing was denied on October 20, 1978. (Appendix I).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC§1254. (Appendix B).

QUESTIONS PRESENTED

I. DOES THIS OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICT WITH THE OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE CASE OF *UNITED STATES* v. *BOARD OF EDUCATION OF GARFIELD HEIGHTS CITY SCHOOL DISTRICT, ET AL*, 581 F2d 791 (AUGUST 7, 1978) AND WITH DECISIONS TO BE RENDERED IN THE NINTH CIRCUIT?

II. DID THE ATTORNEY GENERAL OF THE UNITED STATES HAVE, AT THE TIME OF THE FILING OF THIS ACTION, AUTHORITY TO INSTITUTE A PATTERN AND PRACTICE DISCRIMINATION LAWSUIT AGAINST A GOVERNMENTAL ENTITY, ABSENT A REFERRAL FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION?

III. DOES THE REORGANIZATION PLAN NO. 1 OF 1978, AS INTERPRETED BY THE FOURTH CIRCUIT COURT OF APPEALS, VIOLATE ARTICLE I, SECTION 1, ARTICLE I, SECTION 7, CLAUSES 2 AND 3 AND ARTICLE II, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES?

IV. CAN THE REORGANIZATION PLAN NO. 1 OF 1978, EFFECTIVE JULY 1, 1978, BE APPLIED RETROACTIVELY AND THE ATTORNEY GENERAL BE GRANTED RETROACTIVE STANDING?

V. DO THE PROCEDURES FOR CONCILIATION AND OPPORTUNITY TO RESOLVE THE MATTER WITHOUT CONTESTED LITIGATION OF 42 USC 2000e-5(b) APPLY TO THE ATTORNEY GENERAL AND ARE THEY REQUIRED TO BE UTILIZED PRIOR TO FILING SUIT AGAINST A GOVERNMENTAL ENTITY?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 1, Article I, Section 7, Clauses 2 and 3, and Article II, Section 1, of the Constitution of the United States. (Appendix C and D).

STATEMENT OF THE CASE AND FACTS

On October 23, 1975, the United States filed a complaint in the United States District Court for the Eastern District of North Carolina against the State of North Carolina, the Commander of the North Carolina State Highway Patrol and the Secretary of the North Carolina Department of Transportation and Highway Safety. The United States alleged that the Defendants

had pursued and were pursuing "practices which discriminate against blacks and women with respect to employment opportunities in the North Carolina State Highway Patrol, "and that such acts and practices constituted a pattern or practice of resistance to the full employment rights secured by Title VII of the Civil Rights Act of 1964, as amended, the Fourteenth Amendment, and 42 USC§1981 and 1983. Jurisdiction was alleged under 42 USC§2000e-6(b)[Section 707 (b) of the Civil Rights Act of 1964)] and 28 USC §1345.

Defendants filed a motion for judgment on the pleadings on May 28, 1976, contending that the Attorney General had no authority to bring a pattern or practice suit under Section 707 of the Civil Rights Act of 1964, as amended, absent a referral from the Equal Employment Opportunity Commission (EEOC). On December 30, 1976, a United States magistrate entered a memorandum opinion and recommendation stating that the Court did not have jurisdiction of the subject matter of the complaint and recommended the Defendants' Motion be granted.

On January 27, 1977, the District Court entered an order granting defendants' motion for judgment on the pleadings and dismissing the action. The United States filed a timely notice of appeal on March 22, 1977.

On July 13, 1977, Defendants moved for summary affirmance in the Fourth Circuit. On January 12, 1978, this motion was denied

On February 23, 1978, the President submitted to Congress "Reorganization Plan No.1 of 1978". (Appendix E.) Section 5 of the Plan transfers to the Attorney General full and complete authority in the "...initiation of litigation with respect to State or local government, political subdivision..." under Section 707 of the Act, 42 USC 2000e-6. Congress made no objection and, by Executive Order 12068 of June 30, 1978, the Plan became effective July 1, 1978. (Appendix H).

The case in the United States Court of Appeals for the Fourth Circuit was argued on February 7, 1978 and decided September 12, 1978. In a published opinion (originally unpublished) it was held that the Court must apply the law as it is now written and therefore the District Court's dismissal must be reversed. The case was remanded for further consideration of all other issues. On September 25, 1978, the Defendants filed a petition for rehearing. On October 20, 1978, this petition for rehearing was denied. On October 30, 1978, Defendants filed a motion for stay pending application to this Court for a Writ of Certiorari. On November 3, 1978, Defendants' motion for stay was denied.

On November 8, 1978, the Defendants made application to this Court for a stay pending filing a petition for writ of certiorari. On November 21, 1978, this application for a stay was denied.

REASONS FOR GRANTING WRIT

I. The Opinion of the Fourth Circuit Court of Appeals Is In Conflict With The Opinion of the Sixth Circuit Court of Appeals In The Case Of *United States of America* v. *Board of Education of Garfield Heights City School District, Et Al*, 581 F 2d 791 (August 7, 1978) and May Conflict With Decisions To Be Rendered In The Ninth Circuit.

The Fourth Circuit Court of Appeals, mistakingly relying upon *Bradley* v. *Richmond School Board*, 416 U.S.696, 40 LEd 2d 476, 94 S.Ct. 2006 (1974), held that it was bound to apply the law in effect at the time of their decision and that the Reorganization Plan No.1 of 1978 gave the Attorney General standing to bring this suit. It reversed the dismissal of the suit and remanded the case to District Court. (Appendix A).

The Sixth Circuit in a case of *United States of America* v. *Board of Education of Garfield Heights City School District*, 581 F 2d 791 (August 7, 1978), correctly ignored the "Reorganization Plan No. 1 of 1978" and determined that this Court's decision in *United States* v. *State of South Carolina*, 434 US 1026, 98 S.Ct. 756, 54 LEd 2d 775 (1978) summarily affirming 445 F. Supp. 1094 (3 Judge Court) (D.C.S.C. 1977), controlled and the Attorney General was without authority or standing to bring a pattern and practice action without a referral from EEOC.

In addition, two District Court cases were recently argued in the Ninth Circuit Court of Appeals and the decision of the Ninth Circuit will probably conflict with either the Fourth Circuit opinion or the Sixth Circuit opinion. *United States* v. *Fresno Unified School District*, ____ F 2d ____ No. 76-2539 (Oral argument held December 5, 1978) lower court opinion 412 F. Supp. 392 (E.D.Cal. 1976); *United States* v. *Pima County Community College District*, ____ F 2d ____ No. 77-1965 (Oral argument held December 5, 1978) lower court opinion 409 F. Supp. 1061 (D. Ariz. 1976).

II. The Attorney General Lacked The Authority To Bring A Pattern Or Practice Lawsuit Against A Governmental Entity Under Title VII Absent A Referral From The Equal Employment Opportunity Commission.

A. The decision of the Fourth Circuit decides an important question of federal law which has not, but should be, settled by this Court.

Prior to the 1972 Civil Rights Act amendments, the Attorney General had independent authority to bring equal employment cases against *private* employers under Title VII of the 1964 Civil Rights Act without a referral from EEOC. (Appendix G). Prior to the 1972 amendments, neither the Attorney General nor the EEOC had authority over governmental entities. Governmental entities were not employers as defined by the Act. The 1972 amendments, in addition to extending coverage to governmental entities, transferred the Attorney General's authority under Title VII to EEOC and conditioned the institution of pattern or practice cases against governmental entities on referral

from the EEOC. At the same time the 1972 amendments gave the EEOC investigatory and conciliatory authority in connection with Title VII equal employment cases involving public or governmental employers. 42 USC 2000e (Appendix G).

Section 2000e-6 of Title 42 establishes the standard for instituting civil actions where any person or groups of persons, including governmental entities, is engaged in a pattern or practice of discriminatory employment. The relevant sections of the Code follow:

> §2000e-6(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint....
>
> (c) effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission....
>
> (e) subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a change of a pattern or practice of

> discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title." (Appendix G).

Subsection (c) and (e) of 2000e-6 clearly show the intent of Congress to place both the investigatory and enforcement powers in a pattern or practice discrimination suit in EEOC. No provision subsequent to 2000e-6(c) and (e) makes allowance for the Attorney General to initiate the type of suit brought in the case at bar. Clearly, the filing of this lawsuit without a referral from EEOC represents an attempt by the Attorney General to usurp these legislatively delegated powers. Attempted jurisdiction without legislative authority is ineffective.

Section 2000e-6 is regulated by 2000e-5 and notice must be taken of relevant portions of that provision:

> "Title 42,§2000e-5(f) In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court." (Appendix G).

The wording, meaning and intended result of Title 42, Sections 2000e-6(c) and 5(f) are both direct and unequivocal. Initial authorization to bring suit or to investigate alleged patterns or practices of discrimination vests with the Commission. No Provision is made for the Attorney General to initiate any aspect of this type of case.

Authority for the Attorney General to enter litigation is provided for in Section 2000e-5(f). This provision removes any inherent authority the Attorney General may presume to possess. By including a clause strictly outlining procedures by which the Attorney General may enter a suit of this nature, all avenues outside those procedures are limited by the doctrine of *Inclusio Unius Est Exclusio Alterius.* No provision is made for the Attorney General to initiate conciliation agreements or to bring actions without the initial involvement of the EEOC.

As in the case at bar, there have been similar holdings in other district courts that the Attorney General may not file a pattern or practice lawsuit without a referral from EEOC. *United States* v. *Fresno Unified School District, supra; United States* v. *Pima County Community College District, supra; United States* v. *City of Pompano Beach,* ____ F.Supp. ____, No. 76-6059 (S.D. Fla. 1976); *United States* v. *Board of Education of Garfield Heights City School District, supra;* and *United States* v. *Sweet Home Cent. School District,* 407 F. Supp. 1362 (D.C.N.Y. 1976).

All cases instituted by the Attorney General after March 24, 1974, must be upon referral from EEOC. This important question of federal law that affects all fifty states, each board and agency of each state and every political subdivision of each state should be settled by this Court.

B. The decision of the Fourth Circuit Court of Appeals decided a federal question in a manner conflicting with applicable decisions of this Court.

This Court in *United States* v. *State of South Carolina* 445 F. Supp. 1094 (D.C.S.C. 1977) summarily affirmed 434 U.S. 1026, 54 L.Ed 2d 775, 98 S. Ct. 756 (1978), was presented with the issue of whether government entity absent a referral from EEOC. This Court, in summarily affirming the decision of the three judge Court, conclusively decided this issue. A summary disposition by the Supreme Court prevents the lower court from coming to opposite conclusions on the precise issues presented and necessarily decided by the disposition. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977).

The Fourth Circuit ignored these decisions and instead chose to grant the Attorney General the authority to bring a lawsuit without a referral from EEOC. This opinion is in direct conflict with *United States* v. *State of South Carolina* and other decisions of this Court which conclusively settled this issue.

III. The Reorganization Plan No. 1 of 1978, as Interpreted By the Fourth Circuit Court of Appeals, Violates Article I, Section 1, Article I, Section 7, Clauses 2 and 3, and Article II, Section 1 of the Constitution of the United States.

A. The Fourth Circuit decision below decides this important question of federal law which has not, but should be, settled by this Court.

Article I, Section 1 of the Constitution provides that the legislative function shall be in Congress composed of the Senate and House of Representatives. Article I, Section 7, Clause 2, sets forth the procedure for enacting legislation and Clause 3 provides "every order, resolution or vote" to which concurrence of both houses is necessary shall be presented to the President for his approval or veto. This Court has consistently held:

> "In the framework of our Constitution, the President's power to see that the laws are forthfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing laws he thinks bad and the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute....
>
> * * *

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times..." *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 US 579, 587-589, 72 S.Ct. 863, 96 LEd 1153 (1952).

After the ruling of the District Court and prior to the decision of the Fourth Circuit, the President submitted to Congress "Reorganization Plan No. 1 of 1978" (Appendix E) pursuant to Title 5, §901 *et seq.* of the United States Code (Appendix F). These sections set forth a procedure for the President to reorganize the Executive Branch of government. The President is authorized to submit a reorganization plan to Congress. This plan may provide for the transfer of, from one department of the Executive Branch to another, any function expressly provided by the law. If either House of Congress does not pass, within 60 days, a resolution objecting to the plan, then the plan becomes effective on a date specified by the President. 5 USC 906(a). The "Reorganization Plan No. 1 of 1978" was submitted and in part purported to transfer or "clarify" the authority of the Attorney General to bring a pattern and practice discrimination lawsuit under Title VII against a governmental entity. This authority was transferred from the Attorney General to EEOC by the 1972 Amendments to the 1964 Civil Rights Act. See Appendix G. The Plan also mandated the Attorney General would provide an opportunity for conciliation prior to contested litigation. (Appendix E).

The purpose of the reorganization statute is set forth in 5 USC§901(a). See Appendix F. Congress declared the policy of the United States to be as follows:

(1) to promote the better execution of the laws, the more efficient management of the Executive Branch and of its agencies and functions, and the expeditious administration of the public business.

(2) to reduce expenditures and promote economy...;

(3) to increase the efficiency of the operations of the government...;

(4) to group, coordinate, and consolidate agencies and functions of the government, as nearly as maybe, according to major purposes;

(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and

(6) to eliminate overlapping and duplication of effort."

The Executive Reorganization Act was not intended to allow the Executive to deprive an individual or governmental entity of any rights granted to it by Congress. Efficiency of government was its purpose, not granting the President the authority to legislate.

The opinion of the United States Attorney General as to the constitutionality of the Executive Reorganization Act buttresses our position. The Attorney General said:

> "In conclusion, I reiterate that my opinion as to the constitutionality of the legislative veto device is limited to the narrow context of the reorganization statute. This procedure is uniquely appropriate to executive reorganization. The reorganization statutes *does not affect the rights of citizens or subject them to any greater governmental authority than before.* It deals only with the internal organization of the Executive Branch, a matter in which the President has a peculiar interest and a special responsibility.
>
> For the above reasons it is my conclusion that the procedure provided for in Section 906(a) of the reorganization statutes does not violate the Constitution." 43 Op. Atty. Gen. No. 10, p. 4-5. (1977). (Emphasis added.)

Prior to the Reorganization Plan the Petitioners were guaranteed the right to notice and an opportunity to resolve this matter without contested litigation, 42 USC 2000e-5(b). The Attorney General deprived us of these rights by usurping the authority of EEOC and instituting this lawsuit without a referral. The Fourth Circuit is interpreting the Reorganization Act to allow the President to deprive the Petitioners of rights previously

granted and to allow the President to legislate. When do the Petitioners' rights to conciliation and an opportunity to resolve this matter without contested litigation vest? When will we be accorded our rights? The Fourth Circuit has, through its interpretation of the law, deprived us, forevermore, of any opportunity to avoid this costly and distasteful litigation. We are deprived of the same rights granted to every other person; granted to every governmental entity by the Reorganization Plan itself. The functions of "investigations, findings, notice and an opportunity to resolve the matter without contested litigation" were all transferred. (Appendix E). We do not doubt the authority of the President to transfer this power; we do doubt the authority of the President in so doing to deprive us of our rights. To allow the President to deprive us of a right previously granted by Congress, would be unconstitutional. Unless the right to conciliation and an opportunity to settle the matter without contested litigation is preserved, the reorganization act and any plan would be unconstitutional. This right to conciliation would require at least substantially the same rights that the petitioners enjoyed prior to the reorganization.

The opinion of the Fourth Circuit totally ignored this vital issue. It is unconstitutional to apply the law as written unless the procedural rights of the petitioners are preserved. The failure to so hold causes the Appeals Court opinion to be in error on this important question of federal law. This Court should now determine this important question of federal law.

IV. The Reorganization Plan No. 1 Of 1978, Effective July 1, 1978, Cannot Be Applied Retroactively And The Attorney General Cannot Be Granted Retroactive Standing.

A. The decision of the Fourth Circuit Court of Appeals conflicts with the decisions of this Court concerning retroactive application of a change in law and standing.

Prior to the Reorganization Plan, the Attorney General had no authority to bring this action without a referral from EEOC. The Fourth Circuit now applies the Reorganization Plan retroactively and allows him to bring this action. This decision gives the Attorney General retroactive standing. Retroactive application of statutes is unfavored unless Congress has clearly and unambiguously indicated an intent for such application. *Greene* v. *United States,* 376 U.S. 149, 11 L.Ed 2d 576, 84 S.Ct. 615 (1964). One of the first rules of statutory construction is that legislation must be considered as addressed to the future, not the past. Retrospective operation will not be given to a statute unless such is the manifest intent of the legislature. *Pugett Sound Power And Light Co.* v. *FPC,* 557 F 2d 1311, 1314 (9th Cir. 1977). The burden is on the appellant to show that it is the intent of Congress, by failing to object, that this reorganization plan would apply retroactively to all lawsuits filed by the Attorney General prior to the effective date of the reorganization. The respondent cannot do so. There is no evidence or legislative history to indicate Congress intended such

reorganization to affect existing litigation. The application of this reorganization to this lawsuit and other such lawsuits would cause a manifest injustice. The respondent is a member of the Executive Branch who had the authority to make rules in this situation. The Executive Branch failed to follow the rules set forth. Now it is attempting to change the rules after the game has begun. Such a result is unconscionable. The Attorney General, if anyone, should be made to abide by the rules. Congress granted certain procedural rights to every employer, including state governments. The Attorney General chose to ignore these procedures and now after the fact, wants to justify his actions. To allow the Attorney General to avoid the requirements imposed by Congress until he can have such requirements modified, is clearly an injustice. Absent a clear showing of congressional intent and lack of harm to the petitioners, this Court should not apply the reorganization act in a retroactive manner.

There has never been a doctrine in the history of this Court of retroactive standing. A party must have standing to bring a lawsuit and cannot be granted such a right retroactively. A litigant may only assert his own constitutional rights or immunities. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 LEd 2d 393 (1960); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 LEd 2d 830 (1972). This doctrine applies to the Attorney General also. At the institution of this suit the Attorney General did not assert an independent authority to bring a pattern and practice lawsuit. He asserted only the authority contained in Title VII of the

1964 Civil Rights Act, as amended. At the time he brought the lawsuit he had no standing. If, at a later date, the Congress or the President without objection of the Congress gives the Attorney General standing, he must then institute the lawsuit. If he had no standing to institute the lawsuit, it cannot now be granted retroactively.

This doctrine of retroactive standing is extremely important to the Defendants. The Plaintiff, Attorney General, asserts a denial of employment and promotion opportunities for minorities and women in the North Carolina Highway Patrol. A determination of back pay, if any is allowed, will be based in part upon the filing date of the lawsuit. The liabilities of the Defendants may be increased greatly by an improper retroactive application. The issues of laches, statutes of limitations, measures of damages, the tests and internal procedures in effect and the substantive law to be applied will be determined by the filing date.

The Reorganization Act prohibits retroactive application of any reorganization plan. 5 USC §907 (a) says:

> "A statute enacted, and a regulation or other action made prescribed... by any agency... affected by a reorganization under this Chapter, before the effective date of the reorganization, has... the same effect as if the reorganization had not been made...."

This case must be treated as if the reorganization "had not been made". The Attorney General has no authority to bring this suit and the Court of Appeals cannot apply the Reorganization Plan retroactively.

The Fourth Circuit, mistakeningly relying upon *Bradley* v. *Richmond School Board,* 416 U.S. 696, 40 LEd 2d 476, 94 S.Ct. 2006 (1974), held that it was bound to apply the law as written; that the Plan gave the Attorney General the necessary authority; and the case should be remanded to District Court. The Sixth Circuit in the case of *United States* v. *Board Of Education Of Garfield Heights City School District, supra,* correctly ignored the reorganization act and determined that this Court's decision in the *United States* v. *State Of South Carolina, supra,* controlled and the Attorney General was without authority or standing to bring such an action. *Bradley* did state that a Court "is to apply the law in effect at the time it renders it decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *supra* at 711. This holding was not intended to grant retroactive standing or confer jurisdiction where none existed. *Bradley* should be strictly limited to its fact situation. *Bradley* applied retroactively in awarding of attorney's fees. The Court stated that there was arguable authority for the District Court to award attorney's fees without the statute and it appeared from the legislative history that Congress intended the statute to be applied retroactively. Also, the awarding of attorney's fees was essentially equitable in nature—the Court felt it simply would not be fair to the plaintiffs to deny them attorney fees in that they had undertaken a burdensome and

socially desirable task. Based upon these factors, the Court ruled that the attorney's fees were proper. In the case at bar, there is no such arguable authority and the Attorney General, with his almost limitless resources, is not in the same equitable position.

This Court had settled the issue of congressional intent in transferring all authority to EEOC. The Attorney General was allowed to bring such actions only after referral. *Bradley* should not be read as to apply to the determination of retroactive application of reorganization plans.

If this Court does find that the principal in *Bradley* applies, the exception to *Bradley* should also apply. It is clearly a "manifest injustice" to deprive the Petitioners of their right to notice and an opportunity to resolve this matter without contested litigation. Also, the statutory direction is to the contrary. 5 USC § 907 (Appendix F). It was never the intent of this Court that the decision in *Bradley* would be used in this manner. The decision of the Fourth Circuit is in total conflict with the decisions of this Court.

V. The Procedures For Conciliation And An Opportunity To Resolve The Matter Without Contested Litigation Of 42 USC 2000e-5(b) Apply To The Attorney General And Are Required To Be Utilized Prior To Filing Suit Against A Governmental Entity.

A. The Fourth Circuit decision below decides this important question of federal law which has not, but should be, settled by this Court.

Prior to reorganization, the petitioners, governmental entities, were treated the same as other employers, except that EEOC was required to refer all complaints for litigation to the Attorney General's Office. The Congress did not authorize an executive agency to sue a sovereign state. Before the EEOC could refer a complaint to the Attorney General for instituting a lawsuit, it was required to proceed pursuant to 42 USC 2000e-5(b). Once these efforts at conciliation were complete, EEOC could refer the matter to the Attorney General.

The reorganization act, 5 USC 901 *et seq.* does not purport nor can it constitutionally allow the President to deprive an entity, especially a sovereign state, of any rights previously granted by Congress. The reorganization act is very explicit. "A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress". 5 USC 905(a)(4) (Appendix F). The only function "expressly authorized by law at the time the plan is transmitted to Congress" is the functions found in 2000e-5. The notice, investigation and an opportunity to "eliminate any alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion" is contained in 42 USC

2000e-5(b) (Appendix G). This Court must determine that the only constitutionally or statutorily authorized reorganization would require the Attorney General to be bound by 42 USC 2000e-5. The petitioner, a governmental entity, has the right to all of the procedures afforded it prior to reorganization. The Fourth Circuit Opinion failed to address this issue. The Attorney General has failed to show even partial compliance.

The President recognized this constitutional and statutory mandate in the Reorganization Plan by requiring "all necessary functions related thereto [the institution of a suit against a governmental entity] including investigations, findings, notice and an opportunity to resolve the matter without contested litigation" were transferred. (Section 5, Appendix E). He further stated that the Attorney General was to exercise the transferred authority "in accordance with procedures consistent with said Title VII." The only procedures consistent with Title VII are those found in 42 USC 2000e-5(b). This Court has repeatedly held that its the Supreme Court's task not to destroy a statute if it can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. *United States Civil Service Com.* v. *National Assoc. Of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 LEd 2d 796 (1973). The Supreme Court of the United States consistently seeks an interpretation which supports the constitutionality of legislation. *Parker* v. *Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 LEd 2d 439 (1974). The same construction should hold true for a

reorganization plan. The Plan should be construed to effect the intent of Congress evidenced by 5 USC § 901 and to keep the Plan within constitutional limitations. In order to effect this construction, the Court must determine that 42 USC 2000e-5(b) applies to the Attorney General.

The President later attempted in Executive Order 12068, Appendix H. which provided for the effective date of the transfer of the functions to the Attorney General, to amend his reorganization plan. The President said:

> "1-102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan No. 1 of 1978 shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, be performed in accordance with Department of Justice procedures heretofore followed under Section 707."

Such a purported modification is not in compliance with 5 USC 903. (Appendix F). The transfer must be in accordance with the reorganization plan which specifies the use of Equal Employment Opportunity Commission functions including "investigations, findings, notice and an opportunity to resolve the matter without contested litigation". The President is without authority to change these procedures. The reorganization authority of Title 5 does not extend this far.

Even if Title 5 could constitutionally be construed to allow a deprivation of such rights, the President is required to submit such a change to Congress for its opportunity to object. Executive Order 12068 appears to be an admission on the part of the President that the Attorney General is bound by the procedures of 42 USC 2000e-5(b).

All fifty states, every political subdivision on all fifty states, every board, agency or department of all fifty states and every subdivision thereof, are subject to the power of the Attorney General. This Court must insure them that their rights will be safeguarded. This Court shall now settle these important issues governing relations between two branches of government and clarify the federal law that affects so many.

CONCLUSION

It is clear that the Attorney General failed to obtain a required referral from EEOC. After his case was dismissed, the Attorney General appealed to the President who, through the authority granted by Congress, reorganized the Executive Branch to attempt to cure the error committed by the Attorney General. Such an error cannot be cured in such a manner. Congress did not intend reorganization plans to affect existing rights or to justify ultravirus actions. The petitioners were not accorded the rights mandated by Congress. The Circuit Courts disagree as to this effect. This court should now accept this petition and issue a

writ of certiorari to the United States Court of Appeals for the Fourth Circuit. This Court should determine this important question of federal law which affects all 50 sovereign states, each and every board, agency and commission of each state and every political subdivision.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals

For The Fourth Circuit

No. 77-1614

United States of America,

Appellant,

v.

State of North Carolina,

E. W. Jones, Commander,
North Carolina State Highway
Patrol, Jake Alexander, Secretary,
North Carolina Department of
Transportation and Highway Safety,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

(Argued February 7, 1978 Decided September 12, 1978

Before Bryan, Senior Circuit Judge, Widener and Hall, Circuit Judges.

Judith E. Wolf, Attorney, Department of Justice (Carl L. Tilghman, United States Attorney; Drew S. Days, III, Assistant Attorney General; Walter W. Barnett, Attorney, Department of Justice on brief) for Appellees.

PER CURIAM:

The District Court on December 30, 1976 dismissed this action of the United States by the Attorney General to restrain the North Carolina State Highway Patrol from engaging in a pattern or practice of discriminating against blacks and women in employment opportunities with the Highway Patrol, as forbidden by Section 707, Title VII, Civil Rights Act, as amended in 1972. 42 USC 2000e-2, 2000e-6(a). Basing his ruling on the statute as amended, the trial judge concluded that the Attorney General's functions, having been transferred to the Equal Employment Opportunity Commission, his authority to bring the suit ceased. 42 USC 2000e-6(c). United States v. *State of North Carolina, Civil Action No. 75-0328-Cir.-5 (DCED N.C. Dec. 30, 1975).*

However, since that decision the President—on February 23, 1978—submitted to Congress, "Reorganization Plan No. 1 of 1978". Section 5 of the Plan transfers to the Attorney General full and complete authority in the "initiation of litigation with respect to State or local government or political subdivisions" under Section 707 of the Act, 42 USC 2000e-6. The Plan was approved by Congress and, by Executive Order of June 30, 1978, was made effective as of July 1, 1978.

Our duty is to apply the law as it is now written. *Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 711 (1974). The result will be to require reversal of the District Court's dismissal for want of authority to bring the suit as well as a remand of the action for further consideration of all other issues.

Reversed and Remanded

APPENDIX B

28 U.S.C.§ 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX C

CONSTITUTION OF THE UNITED STATES
ARTICLE I, SECTION 1

Section 1. Legislative powers vested in Congress.
All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives

ARTICLE 1, SECTION 7, CLAUSES 2 AND 3

Sec. 7, Cl. 2. Approval or veto of bills—Passage over veto.
Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it sahll become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Sec. 7, Cl. 3. Approval or veto of Resolutions, orders, or votes-Passage over veto.
Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

APPENDIX D

CONSTITUTION OF THE UNITED STATES
ARTICLE II, SECTION 1

Section 1, Clause 1. President-Tenure.
The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

APPENDIX E

REORGANIZATION PLAN NO. 1 OF 1978

To the Congress of the United States:

I am submitting to you today reorganization Plan No. 1 of 1978. This Plan makes the Equal Employment Opportunity Commission the principal Federal Agency in fair employment enforcement. Together with actions I shall take by Executive Order, it consolidates Federal equal employment opportunity activities and lays, for the first time, the foundation of a unified, coherent Federal structure to combat job discrimination in all its forms.

In 1940 President Roosevelt issued the first Executive Order forbidding discrimination in employment by the Federal government. Since that time the Congress, the courts and the Executive Branch-spurred by the courage and sacrifice of many people and organizations-have taken historic steps to extend equal employment opportunity protection throughout the private as well as public sector. But each new prohibition against discrimination unfortunately has brought with it a further dispersal of Federal equal employment opportunity responsibility. This fragmentation of authority among a number of Federal agencies has meant confusion and ineffective enforcement for employees, regulatory duplication and needless expense for employers.

Fair employment is too vital for haphazard enforcement. My Administration will aggressively enforce our civil rights laws. Although discrimination in any area has severe consequences, limiting economic opportunity affects access to education, housing and health care. I, therefore, ask you to join with me to reorganize administration of the civil rights laws and to begin that effort by reorganizing the enforcement of those laws which ensure an equal opportunity to a job

Eighteen government units now exercise important responsibilities under statutes, Executive Orders and regulations relating to equal employment opportunity:

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, which bans employment discrimination based on race,

national origin, sex or religion. The EEOC acts on individual complaints and also initiates private sector cases involving a "pattern or practice" of discrimination.

The Department of Labor and 11 other agencies enforce Executive Order 11246. This prohibits discrimination in employment on the basis of race, national origin, sex, or religion and requires affirmative action by government contractors. While the Department now coordinates enforcement of this "contract compliance" program, it is actually administered by eleven other departments and agencies. The Department also administers those statutes requiring contractors to take affirmative action to employ handicapped people, disabled veterans and Vietnam veterans.

In addition, the Labor Department enforces the Equal Pay Act of 1963, which prohibits employers from paying unequal wages based on sex, and the Age Discrimination in Employment Act of 1967, which forbids age discrimination against persons between the ages of 40 and 65.

The Department of Justice litigates Title VII cases involving public sector employers-State and local governments. The Department also represents the Federal government in lawsuits against Federal contractors and grant recipients who are in violation of Federal non-discrimination prohibitions.

The Civil Service Commission (CSC) enforces Title VII and all other nondiscrimination and alternative

action requirements for Federal employment. The CSC rules on complaints filed by individuals and monitors affirmative action plans submitted annually by other Federal agencies.

The Equal Employment Opportunity Coordinating Council includes representatives from EEOC, Labor, Justice, CSC and the Civil Rights Commission. It is charged with coordinating the Federal equal employment opportunity enforcement effort and with eliminating overlap and inconsistent standards.

In addition to these major government units, other agencies enforce various equal employment opportunity requirements which apply to specific grant programs. The Department of Treasury, for example, administers the anti-discrimination prohibitions applicable to recipients of revenue sharing funds.

These programs have had only limited success. Some of the past deficiencies include:

—inconsistent standards of compliance;
—duplicative, inconsistent paperwork requirements and investigative efforts;
—conflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws;
—confusion on the part of workers about how and where to seek redress;

I am proposing today a series of steps to bring coherence to the equal employment enforcement effort. These steps, to be accomplished by the Reorganization Plan and Executive Orders, constitute an important step toward consolidation of equal employment opportunity enforcement. They will be implemented over the next two years, so that the agencies involved may continue their internal reform.

Its experience and broad scope make the EEOC suitable for the role of principal Federal agency in fair employment enforcement. Located in the Executive Branch and responsible to the President, the EEOC has developed considerable expertise in the field of employment discrimination since Congress created it by the Civil Rights Act of 1964. The Commission has played a pioneer role in defining both employment discrimination and its appropriate remedies.

While it has had management problems in past administrations, the EEOC's new leadership is making substantial progress in correcting them. In the last seven months the Commission has redisigned its internal structures and adopted proven management techniques. Early experience with these procedures indicates a high degree of success in reducing and expediting new cases. At my direction, the Office of Management and Budget is actively assisting the EEOC to ensure that these reforms continue.

The Reorganization Plan I am submitting will accomplish the following:

On July 1, 1978, abolish the Equal Employment Opportunity Coordinating Council (42 U.S.C. 2000e-14) and transfer its duties to the EEOC (no positions or funds shifted).

On July 1, 1979, shift responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the EEOC (198 positions and $3.5 million for Age Discrimination).

Clarify the Attorney General's authority to initiate "pattern or practice" suits under Title VII in the public sector.

In addition, I will issue an Executive Order on October 1, 1978, to consolidate the contract compliance program—now the responsibility of Labor and eleven "compliance agencies"—into the Labor Department (1,517 positions and $33.1 million shifted).

These proposed transfers and consolidations reduce from fifteen to three the number of Federal agencies having important equal employment opportunity responsibilities under Title VII of the Civil Rights Act of 1964 and Federal contract compliance provisions.

Each element of my Plan is important to the success of the entire proposal.

By abolishing the Equal Employment Opportunity Coordinating Council and transferring its responsibilities to the EEOC, this plan places the

Commission at the center of equal employment opportunity enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's efforts by developing strong uniform enforcement standards to apply throughout the government: standardized data collection procedures, joint training programs, programs to ensure the sharing of enforcement related data among agencies, and methods and priorities for complaint and compliance reviews. Such direction has been absent in the Equal Employment Opportunity Coordinating Council.

It should be stressed, however, that affected agencies will be consulted before EEOC takes any action. When the Plan has been approved, I intend to issue an Executive Order which will provide for consultation, as well as a procedure for reviewing major disputed issues within the Executive Office of the President. The Attorney General's responsibility to advise the Executive Branch on legal issues will also be preserved.

Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The Federal government must not fall below the standard of performance it expects of private employers.

The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government. While the Chairman and other Commissioners I have appointed have already demonstrated their personal commitment to expanding equal employment opportunity, responsibility for ensuring fair employment for Federal employees should rest ultimately with the EEOC.

We must ensure that the transfer in no way undermines the important objectives of the comprehensive civil service reorganization which will be submitted to Congress in the near future. When the two plans take effect, I will direct the EEOC and the CSC to coordinate their procedures to prevent any duplication and overlap.

The Equal Pay Act now administered by the Labor Department, prohibits employers from paying unequal wages based on sex. Title VII of the Civil Rights Act, which is enforced by EEOC, contains a broader ban on sex discrimination. The transfer of Equal Pay responsibility from the Labor Department to the EEOC will minimize overlap and centralize enforcement of statutory prohibitions against sex discrimination in employment.

The transfer will strengthen efforts to combat sex discrimination. Such efforts would be enhanced still further by passage of the legislation pending before you, which I support, that would prohibit employers from excluding women disabled by pregnancy from participating in disability programs.

There is now virtually complete overlap in the employers, labor organizations, and employment agencies covered by Title VII and by the Age Discrimination in Employment Act. This overlap is burdensome to employers and confusing to victims of discrimination. The proposed transfer of the age discrimination program from the Labor Department to the EEOC will eliminate the duplication.

The plan I am proposing will not affect the Attorney General's responsibility to enforce Title VII against State or local governments or to represent the Federal government in suits against Federal contractors and grant recipients. In 1972, the Congress determined that the Attorney General should be involved in suits against State and local governments. This proposal reinforces that judgment and clarifies the Attorney General's authority to initiate litigation against State or local governments engaged in a "pattern or practice" cases.

A critical element of my proposals will be accomplished by Executive Order rather than by the Reorganization Plan. This involves consolidation in the Labor Department of the responsibility to ensure that Federal contractors comply with Executive Order 11246. Consolidation will achieve the following: promote consistent standards, procedures, and reporting requirements; remove contractors from the jurisdiction of multiple agencies; prevent an agency's equal employment objectives from being outweighed by its procurement and construction objectives; and produce more effective law enforcement through unification of planning, training and sanctions. By 1981,

after I have had an opportunity to review the manner in which both the EEOC and the Labor Department are exercising their new responsibilities, I will determine whether further action is appropriate.

Finally, the responsibility for enforcing grant-related equal employment provisions will remain with the agencies administering the grant programs. With the EEOC acting as coordinator of Federal equal employment programs, we will be able to bring overlap and duplication to a minimum. We will be able, for example, to see that a university's employment practices are not subject to duplicative investigations under both Title IX of the Education Amendments of 1972 and the contract compliance program. Because of the similarities between the Executive Order program and those statutes requiring Federal contractors to take affirmative action to employ handicapped individuals and disabled and Vietnam veterans, I have determined that enforcement of these statues should remain in the Labor Department.

Each of the changes set forth in the Reorganization Plan accompanying this message is necessary to accomplish one or more of the purposes set forth in Section 901(a) of Title 5 of the United States Code. I have taken care to determine that all functions abolished the Plan are done only under the statutory authority provided by Section 903(b) of Title 5 of the United States Code.

I do not anticipate that the reorganizations contained in this Plan will result in any significant change in expenditures. They will result in a more efficient and manageable enforcement program.

The Plan I am submitting is moderate and measured. It gives the Equal Employment Opportunity Commission—an agency dedicated solely to this purpose—the primary Federal responsibility in the area of job discrimination, but it is designed to give this agency sufficient time to absorb its new responsibilities. This reorganization will produce consistent agency standards, as well as increased accountability. Combined with the intense commitment of those charged with these responsibilities, it will become possible for us to accelerate this nation's progress in ensuring equal job opportunities for all our people.

JIMMY CARTER:

The White House, *February 23, 1978*

Reorganization Plan No. 1 of 1978

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, February 23, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

EQUAL EMPLOYMENT OPPORTUNITY

Section 1. *Transfer of equal pay enforcement functions.*

All functions related to enforcing or administering section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the

functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to sections 4(d)(1);4(f);9;11 (a), (b), and (c); 16 (b) and (c) and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. 204 (d) (1); 204(f); 209; 211 (a), (b), and (c); 216 (b) and (c) and 217) and section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).

Section 2. *Transfer of age discrimination enforcement functions.*

All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to sections 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621, 623, 626, 627, 628, 629, 630, 631, 632, 633, and 633a) are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 625 and 634) are hereby transferred to the Equal Employment Opportunity Commission.

Section 3. *Transfer of equal opportunity in Federal employment enforcement functions.*

(a) All equal opportunity in Federal employment enforcement and related functions vested in the Civil Service Commission pursuant to section 717 (b) and (c) of the Civil Rights Act of 1964, as amended (42 U.S.C.

2000e—16 (b) and (c)), are hereby transferred to the Equal Employment Opportunity Commission.

(b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal before the Civil Service Commission on other grounds, a Federal employee alleges a violation of section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—16) provided that the Equal Employment Opportunity Commission retains the function of making the final determination concerning such issue of discrimination.

Section 4. *Transfer of Federal employment of handicapped individuals enforcement functions.*

All Federal employment of handicapped individuals enforcement functions and related functions vested in the Civil Service Commission pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) are hereby transferred to the Equal Employment Opportunity Commission. The function of being cochairman of the Interagency Committee on Handicapped Employees now vested in the Chairman of the Civil Service Commission pursuant to section 501 is hereby transferred to the Chairman of the Equal Employment Opportunity Commission.

Section 5. *Transfer of public sector 707 functions.*

Any function of the Equal Employment Opportunity Commission concerning initiation of

litigation with respect to State or local government or political subdivisions under section 707 of title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—6) and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said title VII. The Attorney General is authorized to delegate any function under section 707 of said title VII to any officer or employee of the Department of Justice.

Section 6. *Transfer of functions and abolition of the Equal Employment Opportunity Coordinating Council.*

All functions of the Equal Employment Opportunity Coordinating Council, which was established pursuant to section 715 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—14), are hereby transferred to the Equal Employment Opportunity Commission. The Equal Employment Opportunity Coordinating Council is hereby abolished.

Section 7. *Savings provision.*

Administrative proceedings including administrative appeals from the acts of an executive agency (as defined by section 105 of title 5 of the United States Code) commenced or being conducted by or against such executive agency will not abate by reason of the taking effect of this plan. Consistent with the provisions of this plan, all such proceedings shall continue before the Equal Employment Opportunity Commission otherwise unaffected by the transfers provide by this plan. Consistent with the provisions of

this plan, the Equal Employment Opportunity Commission shall accept appeals from those executive agency actions which occurred prior to the effective date of this plan in accordance with law and regulations in effect on such effective date. Nothing herein shall affect any right of any person to judicial review under applicable law.

Section 8 *Incidental transfers.*

So much of the personnel, property, records and unexpended balances of appropriations, allocations and other funds employed, used, held, available, or to be made available in connection with the functions transferred under this plan, as the Director of the Office of Management and Budget shall determine, shall be transferred to the appropriate department, agency, or component at such time or times as the Director of the Office of Management and Budget shall provide, except that no such unexpended balances transferred shall be used for purposes other than those for which the appropriation was originally made. The Director of the Office of Management and Budget shall provide for terminating the affairs of the Council abolished herein and for such further measures and dispositions as such Director deems necessary to effectuate the purposes of this reorganization plan.

Section 9. *Effective date.*

This reorganization plan shall become effective at such time or times, on or before October 1, 1979, as the President shall specify, but not sooner than the earliest time allowable under section 906 of title 5 of the United States Code.

5 USC § 901

901. Purpose.—(a) The Congress declares that it is the policy of the United States—

(1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;

(2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;

(3) to increase the efficiency of the operations of the Government to the fullest extent practicable;

(4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;

(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and

(6) to eliminate overlapping and duplication of effort.

(b) Congress declares that the public interest demands the carrying out of the purposes of subsection (a) of this section and that the purposes may be

accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

(c) It is the intent of Congress that the President should provide appropriate means for broad citizen advice and participation in restructuring and reorganizing the executive branch.

(d) The President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary to carry out any policy set forth in subsection (a) of this section.

5 USC § 903

903. Reorganization plans.—(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title [5 USCS § 901(a)], he shall prepare a reorganization plan specifying the reorganizations he finds re necessary. Any plan may provide for—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of a part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the authorization of an officer to delegate any of his functions; or

(6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.

The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reorganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title [5 USCS § 901(a)].

(b) The President shall have a reorganization plan delivered to both Houses on the same day and to each House while it is in session, except that no more than three plans may be pending before the Congress at one time. In his message transmitting a reorganization plan, the President shall specify with respect to each abolition of a function included in the plan the statutory authority for the exercise of the function. The message shall also estimate any reduction or increase in expenditures

(itemized so far as practicable), and describe any improvements in management, delivery of Federal services, execution of the laws, and increases in efficiency of Government operations, which it is expected will be realized as a result of the reorganizations included in the plan.

(c) Any time during the period of thirty calendar days of continuous session of Congress after the date on which the plan is transmitted to it, but before any resolution described in section 909 [5 USCS § 909] has been ordered reported in either House, the President may make amendments or modifications to the plan, consistent with sections 903—905 of this title [5 USCS §§903-905], which modifications or revisions shall thereafter be treated as a part of the reorganization plan originally transmitted and shall not affect in any way the time limits otherwise provided for in this chapter [5 USCS § § 901 et seq.]. The President may withdraw the plan any time prior to the conclusion of sixty calendar days of continuous session of Congress following the date on which the plan is submitted to Congress.

5 USC § 905 and 906

905. Limitation on powers.—(a) A reorganization plan may not provide for, and a reorganization under this chapter [5 USCS § § 901 et seq.] may not have the effect of—

(1) creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or all the functions

thereof, or consolidating two or more executive departments or two or more independent regulatory agencies, or all the functions thereof;

(2) continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;

(3) continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

(4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress;

(5) increasing the term of an office beyond that provided by law for the office; or

(6) dealing with more than one logically consistent subject matter.

(b) A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress within three years of the date of enactment of the Reorganization Act of 1977 [Enacted Apr. 6, 1977].

906. Effective date and publication of reorganization plans.—(a) Except as otherwise provided under subsection (c) of this section, a

reorganization plan is effective at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to its unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.

(b) For the purpose of this chapter [5 USCS § § 901 et seq.]—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(c) Under provisions contained in a reorganization plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective or, if both Houses of Congress have defeated a resolution of disapproval, may be effective at a time earlier than the expiration of the sixty-day period required by subsection (a).

(d) A reorganization plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

907. Effect on other laws, pending legal proceedings, and unexpended appropriations.—(a) A statute enacted, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, before the effective date of the reorganization, has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made. However, if the statute, regulation, or other action has vested the functions in the agency from which it is removed under the reorganization plan, the function, insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan.

APPENDIX G

42 U.S.C. § 2000e

EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this title [42 USCS § § 2000 et seq.]—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning

grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organizations; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voter thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(July 2, 1964, P. L. 88-352, Title VII, § 701, 78 Stat. 253; Sept. 6, 1966, P. L. 89-554, § 8, 80 Stat. 662; Mar. 24, 1972, P. L. 92-261, § 2, 86 Stat. 103.)

42 U.S.C. § 2000e-5

§ 2000e-5. Prevention of unlawful employment practices

(a) Power of Commission. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS § § 2000e-3].

(b) Charges; notification; investigation and determination. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or

local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been

earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) Time for action under State or local law. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful

employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a

civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case

involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS § § 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district

in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USCS § § 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to her and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(h) Certain provisions inapplicable to actions against unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115) [29 USCS § § 101 et seq.], shall not apply with respect to civil actions brought under this section.

(i) Proceedings to compel compliance with orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code [28 USCS § § 1291, 1292].

(k) Attorney's fee. In any action or proceeding under this title [42 USCS § § 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(July 2, 1964, P. L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P. L. 92-261, § 4, 86 Stat. 104.)

42 U.S.C. § 2000e-6

§ 2000e-6. Suits by Attorney General

(a) Complaint. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [42 USCS § § 2000e et seq.], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; hearing and determination. The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney

General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions to Commission. Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code [5 USCS § § 901 et seq.], inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions not to affect suits commenced prior to transfer. Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Authority of Commission to investigate and act on a charge of discrimination whether filed by or on

behalf of aggrieved person or by member of Commission. Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act [42 USCS § 2000e-5].

(July 2, 1964, P. L. 88-352, Title VII, § 707, 78 Stat. 261; Mar. 24, 1972, P. L. 92-261, § 5, 86 Stat. 107.)

EXECUTIVE ORDER [No. 12068]

PROVIDING FOR TRANSFER TO THE ATTORNEY GENERAL OF CERTAIN FUNCTIONS UNDER SECTION 707 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

By virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 F.R. 19807), in order to clarify the Attorney General's authority to initiate public sector litigation under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6), it is ordered as follows:

1—1 SECTION 707 FUNCTIONS OF THE ATTORNEY GENERAL

1—101. Section 5 of Reorganization Plan Number 1 of 1978 (43 F.R. 19807) shall become effective on July 1, 1978.

1—102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan Number 1 of 1978 shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, be performed in accordance with Department of Justice procedures heretofore followed under Section 707.

/s/ Jimmy Carter

THE WHITE HOUSE

June 30, 1978.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 77-1614

FILED
Oct. 20, 1978
WILLIAM K. SLATE, II
CLERK

United States of America,

Appellant,

versus

State of North Carolina,
E. W. Jones, Commander,
North Carolina State Highway
Patrol, Jake Alexander,
Secretary, North Carolina
Department of Transportation
and High Safety,

RECEIVED
Oct. 24, 1978
N.C. Dept. of Jutice

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Widener, and Judge Hall.

For the Court,

/s/ William K. Slate, II

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon the person indicated below by depositing a copy of same in the United States mail, first-class postage prepaid, addressed to the following:

Mr. Wade McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

This the 18th day of January, 1979.

RUFUS L. EDMISTEN
Attorney General

WILLIAM W. MELVIN
Deputy Attorney General

ISAAC T. AVERY, III
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Supreme Court, U. S.
FILED
APR 19 1979
MICHAEL RODAK, JR., CLERK

No. 78-1139

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 587 F. 2d 625. The order of the district court (App. A, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1978. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. A-45). The petition for a writ of certiorari was filed on January 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Reorganization Plan No. 1 of 1978, which clarified the authority of the Attorney General to file a "pattern or practice" employment discrimination action

against state and local governments without referral from the Equal Employment Opportunity Commission, was properly applied to a suit filed prior to the effective date of the plan.

STATEMENT

1. On October 5, 1973, the United States advised the North Carolina Attorney General that the Department of Justice had initiated an investigation of the employment practices of the North Carolina State Highway Patrol. The purpose of the investigation was to determine whether the State Highway Patrol was engaged in violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Eighteen months later, the Department notified the State Attorney General that the United States had concluded that the State was engaged in a pattern or practice of discriminating against blacks and women in the employment of State Highway Patrol personnel. Discussions between the United States and the State of North Carolina ensued. After it became clear that there was no possibility of settlement without contested litigation, the instant suit was filed on October 23, 1975, in the United States District Court for the Eastern District of North Carolina.

The magistrate to whom the matter was referred recommended that the complaint be dismissed. The magistrate concluded (App. B, *infra*) that under Section 707(c) of the Civil Rights Act, the Attorney General had no authority to bring "pattern or practice" suits after March 24, 1974. Although prior to 1972, Section 707 had accorded the Attorney General independent authority to bring pattern or practice suits, the magistrate relied on two previous district court decisions[1] in concluding that the 1972 amendments to Title VII divested the Attorney General of power to bring pattern

[1]The cases the magistrate relied on are *United States* v. *Pima County Community College District*, 409 F. Supp. 1061 (D. Ariz. 1976), and *United States* v. *Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal. 1976). The Ninth Circuit has reversed the judgment in the *Fresno* case (*United States* v. *Fresno Unified School District*, No. 76-2539 (Mar. 12, 1979)), and dismissed the appeal in the *Pima County* case (*United States* v. *Pima County Community College District*, No. 76-1965 (Mar. 12, 1979)) on procedural grounds.

or practice suits against both private and public employers. The district court adopted the recommendation of the magistrate and dismissed the action (App. A, *infra*). The court held that the Attorney General has no authority to bring pattern or practice suits except upon referral from the Equal Employment Opportunity Commission.[2]

2. While the appeal was pending in the Fourth Circuit, the President submitted to Congress, pursuant to 5 U.S.C. 903, a "Plan to Consolidate Federal Equal Employment Opportunity Activities," also known as Reorganization Plan No. 1 of 1978 (Pet. App. A-5 to A-19). Section 5 of the Plan (Pet. App. A-17 to A-18) transfers from the Equal Employment Opportunity Commission to the Attorney General all functions "concerning initiation of [pattern or practice] litigation with respect to State or local government or political subdivisions * * * and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation * * * to be exercised by him in accordance with procedures consistent with said title VII." The Plan became effective on May 5, 1978.[3]

[2]It is undisputed that the Commission took no part in investigation or the prosecution of this suit.

[3]Resolutions disfavoring the Plan were introduced in both houses of Congress, but committees of both houses reported favorably on the Reorganization Plan. See S. Rep. No. 95-750, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 95-1069, 95th Cong., 2d Sess. (1978). The House resolution reached a vote in the House and was defeated by a vote of 356-39. See 124 Cong. Rec.

Exec. Order No. 12068, issued on June 30, 1978 (Pet. App. 44), set July 1, 1978, as the date upon which the Commission's authority with respect to governmental suits against public employers would formally be transferred to the Attorney General.

3. The court of appeals reversed (Pet. App. A-1 to A-3). It held that Section 5 of the Reorganization Plan vests the Attorney General with independent authority to bring pattern or practice suits against public employers, and it held that applying the law "as it is now written" (Pet. App. A-3), the dismissal order must be reversed.[4]

ARGUMENT

The court of appeals properly applied the law in effect at the time of decision in allowing the suit to proceed to the merits. While there is a conflict between the circuits as to retroactive application of the Reorganization Plan, review by this Court is not warranted because that issue is of no continuing importance.

1. Title VII, as amended, plainly accords the Attorney General authority to sue public employers upon referral by the Commission, and the Act concomitantly denies the Commission the authority to initiate suits against state or local governments. See *United States* v. *South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977) (three-judge court), aff'd mem., 434 U.S. 1026 (1978); *United States* v. *Garfield*

H3206 (daily ed. Apr. 25, 1978). In the Senate, the resolution did not reach a vote and so the plan became effective 60 calendar days after its submission.

[4]The court did not address the government's contention that the Attorney General had retained pattern or practice authority with respect to public employers independent of the Reorganization Plan.

Heights City School District, 581 F. 2d 791 (6th Cir. 1978). The Commission is required to investigate all allegations of employment discrimination, whether by public or private employers. 42 U.S.C. 2000e5(b) and 2000e-6(e). The Commission is also required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" (42 U.S.C. 2000e-5(b)). If it is unable to obtain an acceptable conciliation agreement with a respondent who is a private employer, the Commission may bring a civil action against the respondent (42 U.S.C. 2000e-5(f)). If the respondent is a public employer, however, the Commission may not sue, but "shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court" (*ibid.*). This scheme assures that Title VII suits, whether against public or private employers, are preceded by notice to the respondent under investigation and an opportunity to avoid contested litigation by voluntary compliance.

Under the Reorganization Act, 5 U.S.C. 903(a)(1), the President is authorized to "transfer * * * the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency." Section 5 of Reorganization Plan No. 1 (Pet. App. A-17 to A-18) transferred all pre-litigation functions applicable to pattern or practice suits against public employers to the Attorney General, giving him both these functions and responsibility for the litigation itself. The transfer effected by the Reorganization Plan does not extinguish any procedural rights previously enjoyed by public employers. On the contrary, the transfer explicitly preserves them.

Neither court below considered whether the pre-suit course of dealing between the parties satisfied the

procedural requirements contemplated by the Reorganization Plan.[5] The sole question decided below was whether the Attorney General has authority to bring the suit at all. All other questions, including whether the preconditions to suit were met, are reserved for determination on remand. Petitioners thus have not been prejudiced by the application to this case of the law as it stood at the time of the appellate court's ruling. See *United States* v. *Fresno Unified School District*, No. 76-2539 (9th Cir. Mar. 12, 1979), slip op. 8-11, 13-14.

By looking to the law in effect at the time of its decision, the court of appeals correctly applied the doctrines of *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), and *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). In *Bradley*, this Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. That principle was applied in *United States* v. *Alabama*, 362 U.S. 602 (1960), a case closely analogous to this one, where the Court held that the government could bring suit against the State of Alabama, even though the suit was commenced prior to the enactment of the 1960 civil rights statute that authorized naming the State as a defendant.

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[5]As we have noted, there were extensive pre-suit negotiations between the State and the Department of Justice designed to reach a satisfactory accommodation without the need for contested litigation. Discussions concerning entry of a consent decree were carried on both before and after suit was filed. Consent decrees have been recognized as an acceptable means of effectuating Title VII's preference for voluntary settlement. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 848 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

2. The decisions of other courts that have treated this question do not provide any reason for the Court to grant review here. In *United States* v. *South Carolina, supra*, the three-judge district court held that the Attorney General could not bring suit against a public employer without prior EEOC processing and referral. Because that case was decided before the Reorganization Act, it is consistent with the decisions in the instant case and in *United States* v. *Fresno Unified School District*, No. 76-2539 (9th Cir. Mar. 12, 1979). To be sure, in *United States* v. *Garfield Heights City School District*, 581 F. 2d 791 (6th Cir. 1978), the court of appeals declined to give the Reorganization Plan retroactive effect in cases pending on appeal.[6] The government did not seek a writ of certiorari in that case, however, because the option of refiling, in light of the Reorganization Plan, remains open. Because the Reorganization Plan makes it clear that the Attorney General can bring pattern or practice suits without referral from the Commission, the disagreement between the Sixth Circuit on the one hand and the Fourth and Ninth on the other is of no prospective significance and thus does not warrant plenary review by this Court.

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[6]The *Garfield Heights* court mistakenly believed the case to be controlled by this Court's summary affirmance in *United States* v. *South Carolina, supra*. The three-judge court in *South Carolina* had disposed of numerous issues raised by the government and the intervening private parties. Most significantly, the district court had reached the merits of the private plaintiffs' claim, holding that the State had not engaged in unlawful discrimination by using the National Teachers' Examination to certify teachers. Summary affirmance, therefore, necessarily disposed of the case on its merits. The district court's holding with respect to the Attorney General's authority to sue was unnecessary to the ultimate disposition of the appeal. See *United States* v. *Fresno Unified School District, supra*, slip op. 12-13 & n.4, citing, *inter alia*, *Mandel* v. *Bradley*, 432 U.S. 173 (1977).

3. In any event, by consolidating public sector pattern or practice authority in the Attorney General, the Reorganization Plan merely reaffirmed the intent of Congress in passing the 1972 amendments.[7] See *United States* v. *Fresno Unified School District, supra,* slip op. 8. The judgment of the court of appeals can therefore be sustained on this independent ground as well, even though the court did not reach this issue.

Title VII initially exempted states and political subdivisions from coverage. The Act gave the Commission no enforcement power; it was permitted only to process charges of unlawful employment discrimination and to attempt to achieve compliance by means of negotiation and conciliation. These procedures, mandated by Section 706, were (and remain) preconditions to private suit. The Attorney General, however, was authorized by Section 707 of the Act to bring suit, without preconditions, whenever he had "reasonable cause to believe that any person or group of persons [covered by the Act had] engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title * * *." Unlike Section 706, Section 707 was designed "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 843 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

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[7]In his message submitting the Plan to Congress, the President characterized Section 5 as a measure designed to "[c]larify the Attorney General's authority to initiate 'pattern or practice' suits under Title VII in the public sector" (Pet. App. A-10). See also Pet. App. A-13 ("This proposal reinforces * * * and clarifies the Attorney General's authority * * *.").

Congress had two major concerns in 1972 when it amended Title VII: to strengthen the Commission by giving it enforcement as well as conciliation powers; and to extend coverage of the Act to public employers. In enacting the amendments, however, Congress created the ambiguity now present in Sections 706 and 707. While Congress granted the Commission power to sue private employers, it expressly denied it equivalent authority to sue state and local governments. 42 U.S.C. 2000e-5(f)(1). In Section 707(c), on the other hand, the Act purported to transfer from the Attorney General to the Commission the authority to bring pattern or practice suits. 42 U.S.C. 2000e-6. Taken literally, the "transfer" would appear to include the power to bring pattern or practice suits against public employers—a power Congress manifestly did not want to give the Commission.[8]

The only sensible interpretation that is consistent with the purposes of the 1972 amendments is that Congress intended to transfer to the Commission only

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[8]See, *e.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess. 25 (1971) (explaining why the Senate version of the bill requires Attorney General suits against public employers rather than EEOC cease-and-desist proceedings). See also 118 Cong. Rec. 296 (1972) (remarks of Sen. Williams): "During discussion in the committee, several members expressed concern that States and political subdivisions would be subjected to administrative hearings and orders of EEOC. This enforcement scheme was devised to provide the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign States and their localities." Although floor amendment resulted in the Senate's abandoning cease-and-desist authority in favor of court enforcement, the division of Section 706 power between the Commission and the Attorney General remained.

Despite the clear congressional intent to deny the Commission authority to sue public employers, one district court in the Fifth Circuit has held that this power was transferred to the Commission. *United States* v. *Pompano Beach*, No. 76-6059 (S.D. Fla. July 8, 1976).

that power exercised by the Attorney General prior to 1972, *i.e.*, the power to bring pattern or practice suits against entities other than states and local governments. This was the understanding of the bill reported by Representatives Erlenborn and Dent after the Conference Committee had settled upon the final version in March 1972.[9] It was also the interpretation placed upon Section 707 (as amended) by the Senate Committee that considered the Reorganization proposal in 1978 (S. Rep. No. 95-750, 95th Cong., 2d Sess. 4 (1978) (emphasis added)):

> The 1972 amendments to the Civil Rights Act of 1964 amended the existing provision in the 1964 law regarding the Attorney General's authority to bring suits charging a "pattern or practice" of discrimination. That authority, which had been vested exclusively with the Attorney General, was to be shared with the EEOC for 2 years and thereafter transferred (effective March 24, 1974) to the EEOC *except where the defendant is a State or Local Government*. The Department of Justice was to retain jurisdiction to institute pattern or practice suits under title VII against State and Local Government employers subject to the Civil Rights Act.

Both the Senate and House Committees that dealt with Reorganization saw Section 5 of the Plan as a means of restoring certainty to the Attorney General's

[9]See 118 Cong. Rec. 7567, 7568 (1972) (remarks of Rep. Erlenborn); *id.* at 7569 (remarks of Rep. Dent): "The conference bill * * * would, 2 years after enactment, transfer the Justice Department's 'pattern or practice' jurisdiction to the EEOC. * * * The jurisdiction to sue State or local governments would, however, remain solely with the Justice Department so that no overlap would occur in this area."

independent pattern or practice authority with respect to public employers. See S. Rep. No. 95-750, *supra*, at 2; H.R. Rep. No. 95-1069, 95th Cong., 2d Sess. 8 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

DOJ-1979-04

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN District of NORTH CAROLINA
RALEIGH DIVISION

No. 75-0328-CIV-5

UNITED STATES OF AMERICA, Plaintiff

vs.

STATE OF NORTH CAROLINA; E. W. JONES, Commander, North Carolina State Highway Patrol; JAKE ALEXANDER, Secretary, North Carolina Department of Transportation and Highway Safety, Defendants

ORDER

This is an action instituted by the Attorney General of the United States on October 23, 1975 against the North Carolina State Highway Patrol upon allegation that the above-captioned defendants were engaging in practices which discriminate against blacks and women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The defendants filed a motion for judgment on the pleadings which was referred to the United States Magistrate for review and recommendation.

The Memorandum and Recommendation of the United States Magistrate was filed with the court, copies were sent to counsel and written exceptions and replies to the proposed findings and recommendation were filed in apt time. 28 U.S.C. § 636(b) as amended by 90 Stat. 2729, Pub. L. 94-577 (Oct. 21, 1976). The court has made an independent examination of the complaint, the motion, the supporting briefs and responses thereto and concludes that the defendants' motion for judgment on the pleadings should be granted for the reasons set forth in the Magistrate's Memorandum, which is attached hereto and made a part of this order.

Although exceptions were filed to the Magistrate's Recommendation, there is no dispute as to the relevant facts. The dispute concerns the legal conclusion reached, i.e., whether, as of October 23, 1975, jurisdiction to bring pattern and practice suits was lodged with the Attorney General or with the Equal Employment Opportunity Commission (EEOC). Plaintiff admits that 42 U.S.C. § 2000e-6 no longer grants jurisdiction to the Attorney General to bring pattern or practice suits against private employers; however, it argues that a different rule applies in actions against governmental employers. Specifically, plaintiff asserts that in 1975 the Attorney General was authorized to bring a pattern or practice suit against a governmental employer under 42 U.S.C. § 2000e-6 and that it could do so without the referral from the EEOC provided for in 42 U.S.C. § 2000e-5(f)(1).

The argument made by the Attorney General has been rejected in *United States v. Pima County Community College District*, 409 F. Supp. 1061 (D.C. Arizona 1976), and *United States v. Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal. 1976), both of which are cited in the Magistrate's Memorandum. Both cases analyze the legislative history and congressional intent of the 1972 amendments as well as the statutory scheme for pattern or practice suits under 42 U.S.C. § 2000e-5 and 2000e-6 and will not be repeated in this order.

The court finds the 1972 amendments to 42 U.S.C. § 2000e-6(c), (d) and (e) to be unambiguous and in accordance with congressional policy of pursuing a unified program in attacking employment discrimination. Employees look to only one agency for relief. Employees, whether public or private, are free from multiple investigations of employment policies by different agencies. The government is saved duplication of effort

and expense as well as the unnecessary waste of legal and investigative talent. In short, as of October 23, 1975, the Attorney General had no jurisdiction to bring a Title VII pattern or practice suit on his own initiative and in the absence of a referral from the EEOC.

For the foregoing reasons, it is now

ORDERED that the defendants' motion for judgment on the pleadings is granted and the action is dismissed.

/s/ F. T. Dupree, Jr.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 27, 1977.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA RALEIGH DIVISION

CIVIL ACTION NO. 75-0328-CIV.-5

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF NORTH CAROLINA; E. W. JONES, COMMANDER, NORTH CAROLINA STATE HIGHWAY PATROL; JAKE ALEXANDER, SECRETARY NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY, Defendants

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MEMORANDUM AND RECOMMENDATION ON DEFENDANTS MOTION FOR JUDGMENT ON THE PLEADINGS.

This action against the North Carolina State Highway Patrol was instituted October 23, 1975 against the North Carolina State Highway Patrol by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972). Jurisdiction of the court is asserted under 42 U.S.C. § 2000e-6(b), and 28 U.S.C. § 1345. The complaint alleges that the defendants have pursued and continue to pursue practices which discriminate against blacks and women with respect to employment opportunities in the North Carolina State Highway Patrol.

The Attorney General was authorized by the Civil Rights Act of 1964 to bring Title VII pattern and practice

suits against private employers in 42 U.S.C. § 2000e-6(b). The Equal Employment Opportunity Act of 1972 extended the jurisdiction of the Act to cover public employers like these defendants. 42 U.S.C. § 2000e(a). The Act also transferred the functions of the Attorney General under that section 2000e-6 to the Employment Opportunity Commission, such transfer to become effective March 24, 1974, prior to the commencement of this action. 42 U.S.C. § 2000e-6(c).

The defendants have filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, contending that Section 2000e-6(c) of the Equal Employment Opportunity Act of 1972 divested the Attorney General of all authority to bring pattern and practice suits after March 24, 1974, and gave the Equal Employment Opportunity Commission exclusive authority to bring such suits. The defendants also rely upon Rule 12(b)(6); they have filed an affidavit that the EEOC has not been involved in any way in these proceedings, and asked that the motion also be considered as a motion for summary judgment.

The only two opinions cited by either party which are directly in point, those dealing with pattern and practice suits brought by the Attorney General since March 24, 1974, are *U.S. v. Pima County College*, 409 F. Supp. 1061, 12 FEP cases 801 (D.C. Arizona March 22, 1976) and *U.S. v. Fresno Unified School District*, 412 F. Supp. 392, 13 FEP cases 684 (E.D. Cal. April 27, 1976), both of which were pattern and practice suits brought by the Attorney General against governmental units after March 24, 1974. In each case the court granted the defendant's motion for dismissal based on lack of jurisdiction, holding that since March 24, 1974 the sole federal agency authorized to bring a pattern and practice suit against an

employer, either private or public, is the Equal Employment Opportunity Commission.

The plaintiff argues that the 1972 amendments transferring jurisdiction are ambiguous, and that the legislative history shows that it was the intention of Congress that the Attorney General's former authority over pattern and practice suits should survive the 1972 amendments. The language of the amendments seems clear and unambiguous to me, and the court in *U.S. v. Fresno* dealt with the argument and rejected it. The only case cited by the plaintiff in support of jurisdiction is *EEOC v. United Air Lines*, United States District Court, Northern District of Illinois, June 26, 1975, 2 EPD para. 110271, pp. 5135-5136, but in that case the Attorney General brought suit in 1973 prior to the effective date of transfer of jurisdiction to the EEOC. That agency was substituted as plaintiff after the transfer date pursuant to the amendments, and the issue was based on whether the lack of EEOC conciliation efforts prior to institution of the suit was fatal to jurisdiction. The court held that jurisdiction was not lost because the Attorney General had the authority during that period and was not required to pursue the investigative and conciliation remedies which are required of the EEOC. That case is not in conflict with the two cases referred to above.

For the foregoing reasons, it is my opinion that the court does not have jurisdiction of the subject matter and that the defendants' motion to dismiss should be allowed.

This 30th day of December, 1976.

/s/ Logan D. Howell

Logan D. Howell
United States Magistrate